

CAUSE NO.1555099/14-17-00685-CR

FILED IN  
14th COURT OF APPEALS  
HOUSTON, TEXAS  
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CHRISTOPHER A. PRINE  
Clerk

THE STATE OF TEXAS

§

IN THE DISTRICT COURT

v.

§

HARRIS COUNTY, TEXAS

NELSON GARCIA DIAZ

§

228<sup>TH</sup> JUDICIAL DISTRICT

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Having considered the evidence adduced at the hearing on the motions to suppress all evidence obtained from the search of cell phones; having assessed the credibility of the witnesses who testified at the hearing; and having reviewed the reporter's record and the clerk's record, the Court makes the following findings of fact and conclusions of law:

**I. Findings of Fact**

1. On June 23, 2017, defendant filed a "Motion to Suppress All Evidence Obtained From the Search Of The SGH-T139 Cell Phone, SPH-M260, LGM MS770 Cell Phone, SGH-T759 Cell Phone, SCH-U365 Cell Phone, and Dell Studio 1535 In This Case". Defendant claimed the evidence was seized in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. In addition, defendant claimed the seizure also violated Tex. Code Crim. Pro. Art. 18.01(c), 18.02(10) and 18.0215(c).

2. On June 27, 2017, defendant filed a “Motion To Suppress DNA Evidence Seized from Nelson Garcia”. Defendant claimed the evidence was seized in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. In addition, defendant claimed the seizure also violated Tex. Code Crim. Pro. Art. 18.01(c), 18.02(10) and 18.065(a).
3. On June 28, 2017, July 27, 2017, and August 7, 2017 this Court held hearings to consider the defendant’s motions to suppress.
4. The State called Ray Thompson and Robert Layne, Special Agents (SA) with the Drug Enforcement Administration (DEA) to testify at the suppression hearing.
5. The State also called David Angstadt, a Sergeant (Sgt.) with the Harris County Sheriff’s Office and Tuam Pham, an investigator with the Harris County District Attorney’s Office to testify at the suppression hearing.
6. The Court finds the testimony of SA Layne credible.
7. The Court finds the testimony of SA Thompson credible.
8. The Court the testimony of Sgt. Angstadt to be credible at times and not credible at other times.
9. SA Layne received information from two confidential informants regarding an aggravated assault that occurred on September 26, 2013 in the Northwest section of Houston, Texas. The confidential informants were identified as CI-01 (hereinafter confidential informant) and CI-13. The confidential informant

provided information to SA Layne for many years.

10. SA Layne is uncertain about the exact chronology of events; however, he believes the confidential informant contacted him on September 29, 2013. The confidential informant provided SA Layne with a description of the suspect in the aggravated assault and also told him the suspect was known as "Jessie". The confidential informant also provided SA Layne with two telephone numbers for the suspect. The telephone numbers provided are 646-438-5946 and 281-948-0026. Layne considered the number beginning with area code 646 important to the aggravated assault investigation.
11. On September 30, 2013 SA Layne talked with the confidential informant again and met with him in person later the same day.
12. CI-13 also provided Layne with another telephone number.
13. SA Layne believes SA Thompson ran the telephone numbers provided by the confidential informant on October 1, 2013.
14. SA Thompson ran the telephone numbers provided for the suspect given to SA Layne by the confidential informant (CI-01) through DEA databases. SA Thompson learned those numbers were connected to a case in Georgia in which the suspect was listed as "Jessie" Last Name Unknown (LNU). After learning this information, SA Thompson made contact with SA Chris Mueller in Georgia.
15. SA Mueller provided SA Thompson with information identifying "Jessie LNU" as the defendant, Nelson Garcia Diaz. SA Thompson confirmed that

the phone numbers provided by the confidential informant belonged to the defendant, Nelson Garcia Diaz. Not only did SA Mueller provide SA Thompson with “Jessie’s” true name, he also advised SA Thompson that Nelson Garcia Diaz had outstanding warrants. SA Thompson confirmed the defendant was a convicted felon with outstanding warrants in Georgia for armed robbery and kidnapping. SA Thompson and SA Layne then obtained photographs of the defendant, Nelson Garcia Diaz, and showed them to the confidential informant.

16. After SA Layne received the information from the confidential informant, SA Thompson contacted the Harris County Sheriff’s Office to find out which law enforcement officer was assigned to investigate the aggravated assault. SA Thompson learned that Sgt. David Angstadt was assigned to the aggravated assault investigation, but SA Thompson was unable to contact Sgt. Angstadt.
17. In September 2013 and October 2013, Sgt. Angstadt was investigating the aggravated assault the confidential informant discussed with SA Layne as a burglary of a habitation/aggravated robbery that occurred on September 26, 2013 in Harris County, Texas.
18. After SA Layne debriefed the confidential informant, he spoke with Sgt. Angstadt by telephone and confirmed Sgt. Angstadt was working the aggravated assault case. SA Layne told Sgt. Angstadt he was working with a confidential informant who provided him with information on the case, including identifying the suspect as “Jessie”, and providing telephone numbers associated with the suspect. During the same telephone conversation, SA Layne told Sgt. Angstadt the confidential informant met with the suspect and learned that the suspect had apparently dropped a cell

phone battery and a cell phone battery cover at the scene of the aggravated assault. After the confidential informant contacted SA Layne about the aggravated assault, SA Layne researched the information provided by the confidential informant in an effort to learn as much as he could about the investigation. SA Layne did not find any information concerning what evidence was left at the scene of the crime from any of the public disclosures about the case. During SA Layne's telephone conversation with Sgt. Angstadt, Sgt. Angstadt confirmed that a battery and battery cover were in fact left at the scene of the aggravated assault. SA Layne further advised Sgt. Angstadt that DEA had confirmed the telephone numbers provided by the confidential informant belonged to the defendant, Nelson Garcia Diaz, and that Mr. Garcia Diaz had active warrants.

19. Since the DEA could not pay the confidential informant for the information he provided, SA Layne attempted to find out whether the Harris County Sheriff's Office could pay the confidential informant for providing information on the aggravated assault case to DEA. Sgt. Angstadt advised SA Layne that the homicide division did not have funds to pay the confidential informant.
20. SA Layne was concerned about keeping the identity of the informant confidential. He was very concerned about the safety of the confidential informant since the investigation was focused on violent cartel members.
21. Sgt. Angstadt recommended to SA Layne the confidential informant could get paid by calling crime stoppers as an anonymous tipster and reporting his information.

22. Because SA Layne was upset that the county never paid the confidential informant, the inference from SA Layne's testimony is credible that the confidential informant followed Sgt. Angstadt's recommendation and reported his information concerning the aggravated assault case as an anonymous tipster through crime stoppers.
23. The court finds that in an effort to get paid the DEA confidential informant also reported his information concerning the aggravated assault "anonymously" and he is also the anonymous tipster referenced in the search warrant affidavits. (*Defendant's Exhibit 2 and Defendant's Exhibit 3*)
24. SA Layne believes he first spoke with Sgt. Angstadt after debriefing the confidential informant and after SA Thompson contacted Mueller but he is unsure of the exact sequence of events.
25. The information the confidential informant provided to SA Layne and included in the cell phone search warrants and the DNA search warrant (*Defendant's Exhibit 1, Defendant's Exhibit 2 and Defendant's Exhibit 3*) was confirmed and found to be true by SA Layne or SA Thompson. SA Thompson confirmed through SA Mueller that "Jessie LNU" was actually Nelson Garcia Diaz. SA Thompson also confirmed the telephone numbers the confidential informant said belonged to the suspect "Jessie" did belong to the defendant, also known as "Jessie". SA Layne confirmed through Sgt. Angstadt that the items (cell phone battery and battery cover) the confidential informant said were left at the scene of the crime were in fact left at the scene of the shooting.

26. Sgt. Angstadt did not provide SA Layne with any phone numbers or the names of any suspects. Nor did Sgt. Angstadt say anything to SA Layne about an anonymous tipster.
27. Neither SA Layne nor SA Thompson ever provided Sgt. Angstadt with the name and identity of the confidential informant.
28. Sgt. Angstadt testified that on September 30, 2013 he received information related to this case from an anonymous tipster.
29. Although Sgt. Angstadt testified he does not recall if he received the anonymous tip before or after his telephone conversation with SA Layne and that he did not know about a DEA confidential informant, the Court finds this testimony is not credible.
30. Sgt. Angstadt recalls speaking with SA Layne but does not recall if he called SA Layne or if SA Layne called him.
31. Special Agents Layne and Thompson were not aware of an anonymous tipster in this case. The court finds the DEA confidential informant is Sgt. Angstadt's anonymous tipster referenced in the affidavits for the cell phones and the affidavit for Nelson Garcia's DNA sample.
32. The Court finds Sgt. Angstadt's characterization of the DEA confidential informant as an anonymous tipster was incomplete and not completely accurate.
33. The court finds Sgt. Angstadt was misleading in characterizing the DEA confidential informant as an anonymous tipster when it appears he was both

an anonymous tipster and the DEA's confidential informant.

34. Sgt. Angstadt did not know the identity of the DEA's confidential informant.
35. Sgt. Angstadt independently confirmed the defendant, Nelson Garcia Diaz, had open warrants out of state for armed robbery and kidnapping.
36. Luis Bartarse, a Harris County Assistant District Attorney, drafted search warrants for the cell phones in conjunction with Sgt. Angstadt. Sgt. Angstadt provided Bartarse with the information contained in the search warrant affidavits for the cell phones. (*Defendant's Exhibit 2 and Defendant's Exhibit 3*)
37. Sgt. Angstadt prepared the search warrant for Nelson Garcia's DNA sample. (*Defendant's Exhibit 1*)
38. The court finds the testimony of Tuam Pham credible.
39. Tuam Pham spoke with Sgt. Angstadt to review the information Angstadt provided for the search warrant affidavits. After confirming the information in the affidavits with Sgt. Angstadt, Tuam Pham signed as affiant on the search warrant affidavits for the cell phones.
40. The search warrant for the LG MS770 cell phone, the SGH-T759 cell phone and the SCH-U365 cell phone contains a statement asserting Nelson Garcia as the owner or possessor of these phones. The search warrant for the SGH-T139 cell phone and the SPH-M260 cell phone does not state the name of the owner or possessor. *See Defendant's Exhibit 2 and Defendant's Exhibit 3.*

41. *Defendant's Exhibit 2 and Defendant's Exhibit 3* (cell phone warrants) listed specific items to be searched.
42. In *Defendant's Exhibit 2 and Defendant's Exhibit 3* (cell phone warrants), based on his investigation, training and experience Sgt. Angstadt opined:
  - that individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit; and
  - that he had reason to believe the defendant may have communicated with other individuals before, during, or after the commission of the offense using his cellular phone or computer.
43. On October 1, 2013, Nelson Garcia Diaz was arrested on the armed robbery and kidnapping warrants out of Georgia. On October 2, 2013, Nelson Garcia Diaz was charged with felon in possession of a firearm in Harris County, Texas.
44. On October 2, 2013, Sgt. Angstadt initially took an illegal buccal swab from Nelson Garcia Diaz "incident to arrest" without a warrant and after Garcia invoked his Miranda rights.
45. On February 11, 2014, Sgt. Angstadt received the results of the DNA analysis from the October 2013 buccal swab taken from Nelson Garcia Diaz.
46. On March 13, 2014, Nelson Garcia Diaz was indicted for Aggravated Robbery.

47. On April 11, 2014, Sgt. Angstadt drafted and obtained a DNA search warrant to take a second buccal swab from Nelson Garcia Diaz. *Defendant's Exhibit 1*.
48. The Court finds that the information set out in the affidavit for the DNA search warrant (*Defendant's Exhibit 1*) was information that was not obtained as a result of Sgt. Angstadt illegally taking the first buccal swab from Nelson Garcia Diaz.
49. The information made the basis of the probable cause affidavit for the DNA search warrant (*Defendant's Exhibit 1*) was information obtained by Sgt. Angstadt and other law enforcement officers prior to the taking of the first buccal swab on October 2, 2013 and prior to obtaining the results of the first buccal swab from the defendant, Nelson Garcia Diaz on February 11, 2014. No information contained in the affidavit for the DNA search warrant (*Defendant's Exhibit 1*) was derived from or related in any way to the first buccal swab obtained from the defendant, Nelson Garcia Diaz.
50. On April 11, 2014, Sgt. Angstadt obtained a second buccal swab from Nelson Garcia Diaz pursuant to a search warrant. *Defendant's Exhibit 1*
51. The state introduced the results of the second buccal swab taken from Nelson Garcia Diaz on April 11, 2014, in his trial for burglary of a habitation.

## II. Conclusions of Law

Based on the above findings and the applicable law, this Court reaches the following conclusions of law in support of its decision to deny the defendant's motions to suppress:

1. In characterizing the DEA confidential informant as an anonymous tipster, Sergeant Angstadt made an incomplete and not completely accurate statement "... with reckless disregard for the truth, [and that statement] was included by the affiant in the warrant affidavit." *Cates v. State*, 120 S.W.3d 352, 355 (Tex. Crim. App. 2003).
2. Sgt. Angstadt misled the magistrate in failing to disclose that the anonymous tipster was also the DEA confidential informant. However, whether Sgt. Angstadt's source for the information contained in the search warrant affidavits was from a confidential informant, anonymous tipster or both, the manner in which an officer receives information from a confidential informant is not material as it pertains to probable cause. It is not a violation under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) that Sgt. Angstadt failed to identify the anonymous tipster mentioned in the search warrant affidavits as also being the DEA confidential informant. *See Janecka v. State*, 937 S.W.2d 456, 463 (holding where the information attributed to the informant was essentially true, the information crucial to establishing probable cause was not affected); *see also United States v. Clutter*, 914 F.2d 775, 780 (6th Cir.1990) (holding that omission from affidavit of specific description of how information upon which warrant was obtained was not material; also holding that an officer possibly misleading a magistrate to believe that officer who

prepared affidavit and “confidential informant” were two different persons was not crucial to establishing probable cause for search); *United States v. Strini*, 658 F.2d 593, 597 (8th Cir.1981) (omission of confidential informant's name in affidavit is neither perjured testimony nor a *Franks* violation).

3. The Court nonetheless concludes that if Sgt. Angstadt's references to the anonymous tipster are removed from the warrant affidavits, the four corners of the warrants (*Defendant's Exhibit 1, Defendant's Exhibit 2 and Defendant's Exhibit 3*) are sufficient to establish probable cause to search the cell phones and obtain Nelson Garcia Diaz's DNA. *See Franks* at 155-56.
4. Assuming the source of the information contained within the affidavits for the search warrants was an anonymous tipster who was not also a DEA confidential informant, the information he provided was corroborated and found to be true through the independent police work of Special Agents Layne and Thompson. *State v. Duarte* 389 S.W. 3<sup>rd</sup> 349, 358 (Tex. Crim. App. (2012) (holding that tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable).
5. Through their police work Special Agents Layne and Thompson corroborated the information provided by the confidential informant/anonymous tipster and found the information to be true. Where the information attributed to the informant/anonymous tipster was essentially true, the information crucial to establishing probable cause was not affected. *See Janecka, supra*.
6. A judge may issue a warrant for the search of a cellular device only on

application of a peace officer. The application must: (3) state the name of the owner or possessor of the telephone or device to be searched; Tex. Crim. Proc. Code Ann., art. 18.0215(c). The search warrant for the SGH-T139 cell phone and the SPH-M260 cell phone did not state the name of the owner or possessor of these cellphones; however, no evidence from the SGH-T139 cell phone or the SPH-M260 cell phone was admitted in the trial of this case.

7. *Defendant Exhibit 2 and Defendant Exhibit 3* (cell phone warrants) listed specific items to be searched rather than simply permitting a general all records search. *Aguirre v. State*, 490 S.W.3d 102 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2016).
8. The initial DNA sample was taken without a warrant, without Nelson Garcia Diaz's consent, and after Nelson Garcia Diaz asserted his *Miranda* rights. The initial DNA swab was illegally performed under Texas law. *See e.g. State v. Villarreal*, 475 S.W.3d 784,805 (Tex.Crim.App.2014) (warrantless search of biological material illegal).
9. This Court concludes that the probable cause for the second buccal swab for DNA analysis was obtained from sources independent of the first buccal swab and the results therefrom. By obtaining a warrant for the second buccal swab, the State purged the taint of the initial illegal search. *See e.g. Tabler v. State*, AP-75,677, 2009 WL 4931882, at \*10 (Tex. Crim. App. Dec. 16, 2009) (subsequent warrant purged taint of illegal arrest). *See also Wehrenberg v. State*, 416 S.W. 3<sup>rd</sup> 458 (Tex. Crim. App. 2013).
10. The search of the LGM-MS770 cell phone, SGH-T759 cell phone and SCH-

U365 cell phone did not violate the defendant's fourth or fourteenth amendment rights under the United States Constitution.

11. The search of the LGM-MS770 cell phone, SGH-T759 cell phone and SCH-U365 cell phone did not violate Tex. Code Crim. Pro. Art. 18.01(c), 18.02(10) and 18.0215(c).
12. The search of the defendant on April 11, 2014, to obtain a buccal swab for DNA analysis did not violate the defendant's fourth and fourteenth amendment rights under the United States Constitution.
13. The search of the defendant on April 11, 2014.to obtain a buccal swab for DNA analysis did not violate Tex. Code Crim. Pro. Art. 18.01 (c), 18.02(10), and 18.065(a).

Signed this 14 day of December 2018



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Belinda Hill  
Judge Presiding